Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Policies on	)	
Foreign Participation in the	)	**IB Docket No. 97-142**
U.S. Telecommunications	)	
Market	)	

REPLY COMMENTS OF THE OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE[1]

Introduction

1. The Office of the United States Trade Representative (USTR), on behalf of the statutory inter-agency trade policy organization of the Executive Branch (the Executive Branch), respectfully submits the following Reply Comments in response to the Federal Communication Commission's (FCC) Notice of Proposed Rulemaking (NPRM) referenced above.[2] USTR is the Executive Branch agency primarily responsible for developing and coordinating the implementation of U.S. international trade policy, including issuing and coordinating guidance

[1] *See also* Comments of the Office of the United States Trade Representative in the Matter of Rules and Policies on Foreign Participation in the U.S. Telecommunications Markets, IB Docket No. 97-142, dated July 9, 1997; Comments and Reply Comments of the Secretary of Defense in the Matter of Rules and Policies of Foreign Participation in the U.S. Telecommunications Market, IB Docket No. 97-142, dated July 8 and August 11, 1997; and Comments and Reply Comments of the Federal Bureau of Investigation in the Matter of Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, IB Docket No. 97-142, dated July 8 and August 12, 1997.

[2] USTR is the chair of the inter-agency organization created to advise the President on international trade policy. 19 U.S.C. § 1872(a); Executive Order 11846 of March 27, 1975.

on interpretation of U.S. international trade obligations, such as those arising under the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement).[3] USTR offers this reply to comments concerning U.S. rights and obligations under the WTO General Agreement on Trade in Services in the basic telecommunications services sector (GATS telecom agreement).[4]

2. Under the Communications Act of 1934, as amended, (the Communications Act), the FCC may authorize the provision of telecommunications services only if they serve the public interest.[5] Accordingly, the FCC conducts a public interest analysis in reviewing all applications

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[3] 19 U.S.C. § 2171(c)(1).

[4] On February 15, 1997, 69 WTO members agreed to provide each other "market access" and national treatment in some or all of their basic telecommunications sectors. These commitments are embodied in the Fourth Protocol to the WTO General Agreement on Trade in Services (GATS) to which the participating members attached individual Schedules of Commitments and Lists of Article II (MFN) Exemptions. The Fourth Protocol and attached commitments and exemptions are collectively referred to in this submission as the "GATS telecom agreement." The Fourth Protocol will enter into force on January 1, 1998, provided that all participating members have accepted it, or if some acceptances are lacking by December 1, 1997, on a date decided upon by those members who have accepted the Protocol.

[5] *See* 47 U.S.C. § 301 ("No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter."); 47 U.S.C. § 307(a) ("The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter."); 47 U.S.C. § 308 (setting forth requirements for license); 47 U.S.C. § 303(1)(1) (authorizing the FCC "to prescribe the qualifications of station operators," *inter alia*); 47 U.S.C. § 310(b)(4) (providing that the FCC shall refuse to grant or revoke any license whenever more than 25% of the capital stock of the parent of the actual or prospective licensee is foreign-owned or controlled, "if the Commission finds that the public interest will be served by the refusal or revocation of such license."); and 47 U.S.C. § 214(a) (providing generally that "[n]o carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require" the construction, operation, or extension at issue.)

One commenter appears to have argued that the GATS telecom agreement is a treaty which the FCC is bound to uphold as "U.S. law" equivalent to the FCC's governing statutes, *i.e.*, the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.* This is incorrect. The GATS telecom agreement is not self-executing and can take effect in U.S. law only through legislation, regulation, or administrative practice.

to provide interstate and foreign telecommunications services under Section 214 of the Communications Act or to invest in the U.S. market under Section 310(b)(4) of the Act. The FCC also may apply dominant carrier safeguards in granting Section 214 and Section 310(b)(4) authorizations to deter and detect anticompetitive conduct.

3. In its public interest analysis, the FCC considers the general significance of the proposed entry to the promotion of competition in the U.S. basic telecommunications market, the presence of cost-based accounting rates,[6] as well as national security, law enforcement, foreign policy, and trade concerns brought to the FCC's attention by the Executive Branch. The FCC accords deference to the views of the Executive Branch on those concerns because they are uniquely within its competence. Since adopting its *Foreign Carrier Entry Order* in November 1995,[7] the FCC, as part of its overall public interest analysis, has applied an "effective competitive opportunities" test (the ECO test) to determine the legal and practical ability of U.S. carriers to enter the destination or home market of the entity seeking Section 214 or Section 310(b)(4) authorization.

4. If adopted, the NPRM would make important changes in FCC procedures and standards for considering Section 214 and Section 310(b)(4) applications filed by entities from WTO members. The FCC is proposing an open entry policy under which it would continue applying

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[6] The FCC considers this factor only with respect to applications filed under Section 214 of the Communications Act of 1934, 47 U.S.C. § 214.

[7] Market Entry and Regulation of Foreign-Affiliated Entities, *Report and Order*, 11 FCC Reg. 3873 (1995) (*Foreign Carrier Entry Order*).

its public interest analysis and domestic carrier safeguards, as it has since 1934, but would no longer apply the ECO test that it implemented in the November 1995 *Foreign Carrier Entry Order*.[8] Under the NPRM, the FCC would presume that the proposed entry promotes competition in the U.S. market. To rebut this presumption, a petitioner would have to demonstrate that the grant of the application would pose a very high risk to competition in the U.S. basic telecommunications market that could not be addressed by safeguard measures.[9] The FCC would continue to accord deference to the Executive Branch on matters uniquely within its competence that the Executive Branch it brings to the FCC's attention, *i.e.*, national security, law enforcement, foreign policy, and trade concerns.

5. Several commenters in this proceeding have contended that the FCC's denial or conditioning of a license pursuant to its continued application of the public interest analysis or safeguard measures to entities from WTO members would be inconsistent with U.S. obligations and commitments under the GATS telecom agreement. In particular, they have argued that the application of the public interest analysis and safeguard measures would be inconsistent with the market access, domestic regulation, most favored nation (MFN) treatment, and national treatment obligations under the agreement and that the application of the public interest analysis and

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[8] The FCC would continue applying the ECO test as part of its public interest analysis in reviewing applications filed by entities from non-WTO members.

[9] Traditionally, the FCC has applied dominant carrier safeguards to Section 214 authorizations to detect and deter anticompetitive conduct when: (1) a U.S. carrier exercises market power on the U.S. end of a particular international route; or (2) a foreign carrier affiliate of the U.S. carrier has market power on the foreign end of a particular route that can adversely affect competition in the U.S. market for international telecommunications services. The Commission also has conditioned acquisitions or investments in U.S. carriers, including those subject to Section 310(b)(4), by applying competition safeguards.

safeguard measures are not otherwise permitted by a "reference paper" subscribed to by the United States in connection with the GATS telecom agreement[10] or the general exceptions of the GATS.

6. The GATS telecom agreement does not affect the FCC's statutory obligation to apply the public interest analysis. The entry into force of the agreement, however, will fundamentally alter the competitive landscape for basic telecommunications services -- countries accounting for ninety percent of basic telecommunications services trade have made binding commitments to transition from protected telecommunications markets to open markets. As a result, USTR agrees with the FCC's preliminary determination that it is no longer necessary for the FCC to apply the ECO test as part of its public interest analysis with respect to applicants affiliated with service suppliers of WTO members, and that it is appropriate for the FCC to presume that the proposed entry will promote competition in the U.S. basic telecommunications market.

7. The FCC's proposal to apply a rebuttable presumption in favor of granting Section 214 and Section 310(b)(4) authorizations would promote foreign entry and competition in the U.S. basic telecommunications market while protecting it from anticompetitive practices. Nothing in the GATS telecom agreement prohibits a regulatory measure of this type. Moreover, the procedure envisioned in the NPRM is consistent with both the letter and spirit of the pro-competitive regulatory principles set out in the reference paper and incorporated in the U.S.

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[10] The "reference paper" is a set of pro-competitive regulatory principles that 55 WTO members, including the United States, incorporated in their Schedules of Specific Commitments for basic telecom services as additional commitments under GATS Article XVIII. Ten other members incorporated additional commitments in their Schedules that draw upon, or are similar to, portions of the reference paper.

Schedule of Specific Commitments.

8. The FCC's proposal to continue applying its public interest analysis in a manner that defers to the Executive Branch on matters relating to national security, law enforcement, foreign policy, and trade concerns is a matter of the internal allocation of responsibilities within the United States Government and hence is not a measure subject to U.S. obligations under the GATS telecom agreement. More importantly, there is no reason to expect that the recommendations provided by Executive Branch to the FCC in connection with these matters would be inconsistent with U.S. international obligations.[11]

GATS Article XVI - Market Access

9. Some commenters have argued that the application of the FCC's public interest analysis would be inconsistent with U.S. market access commitments under the GATS telecom agreement because the United States did not include a public interest limitation in its Schedule. This

[11] With respect to trade concerns, USTR will provide advice to the FCC on matters relating to the U.S. international rights and obligations. Specific circumstances under which the USTR would provide advice on trade concerns to the FCC include: comments in FCC proceedings, such as this proceeding, to explain and affirm U.S. rights and obligations under trade agreements to which it is a party; implementation of WTO Dispute Settlement Body (DSB) recommendations and rulings pursuant to Section 123(g) of the Uruguay Round Agreements Act, 19 U.S.C. § 3533, including the suspension of concessions resulting from another member's failure to implement a DSB recommendation or ruling pursuant to Section 306(b)(2) of the Trade Act of 1974, as amended, *see* 19 U.S.C. § 2416; determinations under Section 1376 or 1377 of the Omnibus Trade and Competitiveness Act of 1988 relating to foreign telecommunications trade barriers, *see* 19 U.S.C. § 3103; determinations under Section 304 of the Trade Act of 1974, as amended relating to the rights of the United States under a trade agreement or the acts, policies, and practices of a foreign country, *see* 19 U.S.C. § 2414; and recommendations developed by the interagency trade organization, chaired by USTR, pursuant to Section 242 of the Trade Act of 1962, as amended, *see* 19 U.S.C. § 1872. In addition, Section 301(c)(2) of the Trade Act of 1974, as amended, gives the USTR the authority to restrict or deny service sector authorizations subject to regulation by any Federal Government agency after consulting with the head of the agency responsible in furtherance of the USTR's determination under Section 301(a) or (b). *See* 19 U.S.C. § 2411.

argument appears to be based on the faulty assumption that GATS Article XVI prohibits a member government from imposing any conditions on entry into its basic telecommunications services market unless the condition is inscribed in the member's Schedule of Specific Commitments.[12] In fact, Article XVI only prohibits WTO members that have scheduled a sectoral commitment under that article from maintaining or adopting the types of unscheduled limitations and measures defined in GATS Article XVI:2.[13]

10. The FCC's public interest analysis would not constitute the specific type of quantitative and economic-needs-based limitations that are enumerated in Article XVI:2, *i.e.* numerical quotas, monopolies, exclusive suppliers, limitations on the number of natural persons, restrictions on the types of legal entities, or limitations on the participation of foreign capital.[14] Nor would the FCC apply an "economic needs test" in determining whether to grant applications. In fact, under its NPRM, the FCC would presume that additional market entry would increase competition and, assuming other regulatory requirements are met and it does not receive advice from the Executive Branch to the contrary, would grant applications on that basis unless specific evidence in the record demonstrates that market entry by a particular entity would threaten to

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[12] Notably, neither the European Community on behalf of its member states, nor Japan, nor the majority of other participants in the GATS basic telecom negotiations, included their licensing processes *per se* as limitations in their Schedules of Specific Commitments.

[13] According to the negotiating history of GATS Article XVI: "A Member grants full market access in a given sector and mode of supply when it does not maintain in that sector and mode any of the types of measures listed in Article XVI. The measures listed comprise four types of quantitative restrictions (subparagraphs a-d), as well as limitations on forms of legal entity (sub-paragraph e) and on foreign equity participation (subparagraph f). The list is exhaustive. . . ." GATT Secretariat, "Initial Commitments in Trade in Services: Explanatory Note," MTN.GNS/W/164 (Sept. 3, 1994).

[14] The U.S. Schedule of Specific Commitments lists all of the *de jure* limitations on basic telecommunications services maintained by the United States and covered by Article XVI:2.

decrease competition. Because the FCC's public interest analysis is not the type of limitation regulated by Article XVI, there is no need for the United States to have included the analysis as a limitation on its market access commitment in its Schedule of Specific Commitments.

11. While acknowledging that the GATS does not forbid all *ex ante* licensing measures, some commenters have argued that the FCC should nonetheless forego application of the public interest analysis because the United States could adequately protect its interests in assuring competition through application of U.S. antitrust laws,[15] or through recourse to the mechanism set out in GATS Article VIII - Monopolies and Exclusive Service Suppliers, GATS Article IX - Business Practices, and the WTO dispute settlement system.

12. The GATS telecom agreement does not specify a single mechanism for addressing potential anticompetitive practices in the telecommunications services sector. The United States has traditionally relied on a combination of regulatory, government enforcement, and private antitrust mechanisms in this sector, and remains free to do so under the agreement. Furthermore, GATS Articles VIII and IX were never intended to place limits on a government's ability to ensure competition in domestic or international markets.

13. Enforcement of U.S. rights and obligations under the WTO is the responsibility of the Executive Branch. To this end, USTR plans to monitor carefully other members' compliance

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[15] One commenter appears to have suggested that the *ex ante* application of competition laws of general application would not run afoul of Article XVI, but that the *ex ante* application of competition laws focused on the telecommunications sector would. The commenter offers no legal justification for this distinction.

with their WTO obligations -- including their commitments to the pro-competitive regulatory principles in the reference paper -- and to pursue consultation and dispute settlement expeditiously where non-compliance is found. Access to WTO dispute settlement to enforce U.S. rights under the GATS telecom agreement, however, does not eliminate the need for and the appropriateness of the FCC's domestic regulation of basic telecommunications services. Whereas the FCC should not assess a member's compliance with its WTO commitments in licensing foreign carriers, it is appropriate for the FCC, in performing its regulatory functions, to consider a proposed entry's likely risk to competition in the relevant U.S. market for international services.

GATS Article VI - Domestic Regulation

14. Some commenters have argued that application by the FCC of a public interest analysis would be inconsistent with GATS Article VI because, in their view, application of the analysis could not have been reasonably expected at the time the GATS telecom agreement was negotiated and the analysis would not be based on objective and transparent criteria.

15. The "reasonable expectations" argument is not supported by the negotiating history of the GATS telecom agreement. The United States made clear both multilaterally and bilaterally that the FCC would continue applying a public interest analysis following the entry into force of the GATS telecom agreement.

16. Nor is the FCC's proposed application of a public interest analysis inconsistent with the U.S. obligation to administer the U.S. licensing regime in an objective and transparent manner as required by GATS Article VI:4. The purpose of Article VI:4 is to ensure that licensing requirements do not constitute an unnecessary barrier to trade -- not to prohibit licensing authorities from exercising their expertise and discretion in making legitimate determinations as to whether the proposed entry will threaten to decrease competition in the relevant U.S. market for international services.

GATS Article II - Most Favored Nation (MFN) Treatment and GATS Article XVII - National Treatment

17. According to some commenters, the results of the FCC's application of the public interest analysis and dominant carrier safeguards could vary depending on the capital affiliation or place of establishment of the applicant or its affiliate. These commenters argue that the application of the public interest analysis and dominant carrier safeguards would therefore be inconsistent with: (1) GATS Article II because they would accord less favorable treatment to service suppliers of some WTO members than to like service suppliers of other countries; or (2) GATS Article XVII because they would accord less favorable treatment to foreign service suppliers than to like domestic service suppliers.

18. The issue of whether a measure accords less favorable treatment within the meaning of GATS Article II or Article XVII turns in part on whether the services or service suppliers being compared are "like" within the meaning of those articles, as well as on the structure and

application of the measure. Neither the MFN nor the national treatment principle prevents WTO members from applying domestic regulations that may lead to the denial or conditioning of licenses for foreign service suppliers, provided that the application of the regulations does not lead to discriminatory results. Thus, the possibility that the FCC may deny or condition some foreign carriers' Section 214 or Section 310(b)(4) applications does not establish an MFN or national treatment violation. Indeed, the possibility that potential market participants may be denied entry, or that their entry may be conditioned, is inherent in the exercise of any licensing system. Rather, the critical inquiry is whether the application of the licensing system accords less favorable treatment to particular foreign services or service suppliers than to other like foreign services or foreign service suppliers or like domestic services or service suppliers.[16]

19. USTR understands that, regardless of the foreign affiliation or place of establishment of the applicant or its affiliate, the FCC: (1) would apply its public interest analysis with the presumption that the proposed service promotes the public interest in increasing competition; (2) would require petitioners seeking to rebut the presumption to show that the application poses a very high risk to competition that cannot be addressed by safeguard measures; (3) would consider other public interest factors and give deference to the views of the Executive Branch on those concerns uniquely within its competence (*i.e.*, national security, law enforcement, foreign

[16] The obligation to provide "no less favorable treatment" found in both GATS Article II and Article XVII has been consistently interpreted by panels interpreting the same phrase in Article III of the General Agreement on Tariffs and Trade (GATT) not to require "identical" treatment in form, but to require no less favorable treatment in substance. This was made explicit in GATS Article XVII:2, which specifies that a WTO member may accord national treatment to foreign and domestic service suppliers through "either formally identical treatment or formally different treatment." Thus, the critical element of an MFN or national treatment analysis is not whether the treatment of foreign or like domestic and foreign service suppliers is identical, but rather whether the treatment accorded modifies the conditions of competition in favor of like foreign service suppliers or like domestic service suppliers.

policy, and trade policy); and (4) if it finds a threat to competition, would apply dominant carrier safeguards depending on the degree on the risk of competitive harm that a carrier poses.

20. Accordingly, consistent with its understanding that, under the NPRM, the FCC would apply the same substantive standards for granting Section 214 and Section 310(b)(4) authorizations and applying dominant carrier safeguards to all like service suppliers supplying like international services, regardless of capital affiliation or place of establishment, USTR does not anticipate that the FCC will apply this licensing authority in a manner that is inconsistent with the U.S. MFN and national treatment obligations.

Reference Paper and GATS Article XIV - General Exceptions

21. Some commenters have suggested that the FCC's application of the public interest analysis and the possibility that it may deny licenses or impose competitive safeguards are not only inconsistent with relevant GATS provisions but that, in addition, they cannot be justified under the additional commitments the United States made in adopting the reference paper or under GATS Article XIV. As stated previously, the application of the public interest analysis and licensing safeguards would not be inconsistent with U.S. obligations and commitments under the GATS telecom agreement and therefore do not require justification under either the reference paper or GATS Article XIV.[17]

[17] One commenter has argued that the public interest analysis was prohibited under GATS because it was not expressly permitted by GATS Article XIV. This argument is baseless. The GATS telecom agreement does not proscribe all regulatory activity, subject to the provisions of Article XIV. Rather, WTO members are free to take any measure that is neither proscribed by the agreement nor inconsistent with the specific commitments they have made

22. Other commenters have argued that the FCC could not impose pre-entry measures on foreign carriers consistent with the U.S. additional commitments under the reference paper. According to these comments, only the telecommunications regulatory authority in the home territory of the foreign carrier applying for an FCC license may regulate the applicant's anticompetitive behavior.[18]

23. The reference paper does not impose limits on the authority of national regulatory authorities to address anticompetitive behavior in their domestic or international telecommunications markets. Rather, the reference paper imposes an affirmative obligation on each WTO member that has adopted it to maintain appropriate measures to prevent major suppliers in its market from engaging in or continuing anticompetitive practices that may impede entry by firms from other WTO members into that market. The FCC's proposed application of the public interest analysis and safeguard measures fulfills the U.S. additional commitments under the reference paper concerning the prevention of anticompetitive practices in the U.S. telecommunications market.

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pursuant to an agreement. Thus, assuming, for the sake of argument, that GATS Article XIV did not address the application of the FCC's public interest analysis, that would not preclude the U.S. application of such an analysis.

[18] Some commenters have suggested that United States should relax rules for trade partners that have made additional commitments to adopt the reference paper. This suggestion clearly would violate GATS Article II.

Conclusion

24. USTR considers that the license review process enunciated in the FCC's NPRM is consistent with U.S. commitments under the GATS telecom agreement, and will ensure that the United States further opens its telecommunications market while protecting the public interest in competitive telecommunications services.

Respectfully submitted,

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